Supreme Court, U.S.
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No. 01-329

IN THE
SUPREME COURT OF THE UNITED STATES

TERI KENDRICK, in her official capacity as the designated City Prosecutor of the City of Indianapolis, et al.,
Petitioners,
v.
AMERICAN AMUSEMENT MACHINE ASSOCIATION, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals correctly held that enforcement of Ordinance 72, 2000, as it relates to animated depictions of so-called "graphic violence" in currency-operated video games in public places, should be preliminarily enjoined.

RULE 29.6 STATEMENT

In accordance with Rule 29.6 of the Rules of the Supreme Court of the United States, Respondents disclose the following information:

(1) Respondent American Amusement Machine Association has no parent company and does not issue stock.

(2) Respondent Amusement and Music Operators Association has no parent company and does not issue stock.

(3) Respondent Indiana Amusement and Music Operators Association has no parent company and does not issue stock.

(4) Respondent Shaffer Distributing Company, Inc. has no parent company and no publicly traded company owns ten percent or more of its stock.

(5) Respondent Cleveland Coin Exchange, Inc. has no parent company and no publicly traded company owns ten percent or more of its stock.

(6) Respondent Namco Cybertainment, Inc., is a wholly-owned subsidiary of Namco Holding Corporation, which is itself a wholly-owned subsidiary of Namco Ltd. Namco Ltd. is a publicly traded company on the Japanese stock market and no other publicly traded company owns ten percent or more of its stock.

(7) Respondent B.J. Novelty, Inc. has no parent company and no publicly traded company owns ten percent or more of its stock.

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BRIEF IN OPPOSITION

Respondents, American Amusement Machine Association, Amusement and Music Operators Association, Indiana Amusement and Music Operators Association, Shaffer Distributing Company, Inc., Cleveland Coin Exchange, Inc., Namco Cybertainment, Inc., and B.J. Novelty, Inc. oppose the petition for a writ of certiorari.

STATEMENT

The petition should be denied. The unanimous decision of the court of appeals is in full accord with every prior decision of this Court, every prior decision of the courts of appeal and every prior decision of the state courts of last resort. The decision entitles respondents to a preliminary injunction barring the City of Indianapolis--Marion County (the "City") from enforcing General Ordinance No. 72, 2000 (the "Ordinance") as it relates to animated depictions of violent expression in video games as an unjustified violation of free expression. The decision creates neither a conflict among the courts, nor a novel constitutional issue. The Seventh Circuit ruling merely mandates that the City's content-based restriction on expression be enjoined from enforcement unless petitioners present evidence sufficient to overcome the same presumption of unconstitutionality and strict scrutiny that is applied to all content-based restrictions on protected expression to insure that the Ordinance is not a pretext for regulation prohibited by the First Amendment. *See, e.g., United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). The lack of controversy regarding the Seventh Circuit's ruling is demonstrated by petitioners' inability to garner a single vote for further review when petitioners sought rehearing *en banc*. Pet. App. 84a.

I. The Regulated Amusement Machines.

The Ordinance targets currency-operated video games, an interactive form of entertainment. Pet. App. 21a. These video games are stand-alone, self-contained machines consisting of both hardware and software. *Id.* They are located in public

places, and their contents are accessible only upon the payment of a fee. Pet. App. 88a.

Video game content, like the content of books and movies, begins as a creative concept in the minds of the game developers. Pet. App. 23a. Storylines and themes are established that guide the development of the concept art. *Id.* The characters and scenes are animated, and audio engineers add sound and music. *Id.* The end result of this creative process is a complete audio visual presentation.

There is no disagreement between the courts below on the communicative ability of this developing medium of expression. The Seventh Circuit explained, "[m]ost of the video games in the record of this case, games that the City believes violate its ordinance, ... are stories." Pet. App. 9a. They have "a message, even an 'ideology,' just as books and movies do." Pet. App. 10a. The stories include age-old themes of literature such as self-defense, protection of others, or fighting against overwhelming odds. *Id.* Other stories present more modern themes, such as feminist themes depicting women as fully capable as men or indeed more skillful than men. *Id.*

The district court agreed concluding, "[i]t is difficult for First Amendment purposes to find a meaningful distinction between [their] ability to communicate a story line and that of a movie, television show [or] book...." Pet. App. 29a.

II. The Ordinance.

The Ordinance enacted by the City regulates content. It focuses exclusively on the manner that the creative developers choose to present their animated stories and themes, restricting

games containing animated "graphic violence." Pet. App. 30a. Video games presenting stories or themes that contain animated depictions of violence are restricted and those games presenting stories or themes without this type of expression are not regulated.

In an effort to portray the Ordinance as something other than content-based censorship, the petition disregards the actual language of the Ordinance and on no less than a dozen occasions characterizes the Ordinance as one of "parental consent." *See, e.g.*, Pet. 2, 3, 4, 5, 9, 10, 23. It is not. The Ordinance requires all persons under eighteen years of age to be "accompanied" by his or her "parent, guardian or custodian." Pet. App. 89a-90a. Judge Posner emphasized the important distinction between *consent* and *accompaniment*, and the significant burden imposed by the Ordinance's requirement of parental accompaniment, explaining:

> The parent is not permitted to give blanket consent, but must accompany the child to the game room. Many parents are too busy to accompany their child to a game room ... even parents who think violent video games ... edifying ... may rather prevent their children from playing these games than incur the time and other cost of accompanying the children to the game room....

Pet. App. 10a-11a. The Ordinance does not even permit a parent to grant consent, blanket or otherwise, to a neighbor, teacher, older sibling or grandparent to accompany a seventeen-year-old high school senior.

Petitioners' characterization of the Ordinance as merely one of parental consent is further belied by the definition of the phrase "accompanied by." Under the Ordinance, a minor's parent, guardian or custodian must (1) remain within five feet of the minor at all times while he is operating or viewing the regulated games, or (2) appear with the minor each day and consent to the branding of the minor's hand with a clearly visible stamp or the attaching of a wrist band. Pet. App. 86a-87a.

Nor is the petition correct when it argues repeatedly that adult access is unaffected by the Ordinance. *See, e.g.*, Pet. 5, 9, 12. Section 831-7 of the Ordinance, entitled "Harmful games on public property," provides, in its entirety, as follows:

> It shall be unlawful for a registrant or exhibitor to make available on public property any amusement machine that is harmful to minors.

Pet. App. 92a. Public Property includes "all buildings and areas within Marion County that are owned, operated, or leased as lessee, by the City of Indianapolis, Marion County, a city or county department, a city-county agency, or a township...." Pet. App. 88a. Thus, Section 831-7 of the Ordinance is a content-based restriction on expression for all persons, of all ages, under all circumstances.

Even where this medium of expression is permitted by the Ordinance, it is permitted only in the atmosphere of an adult peep show. Every facility that displays regulated machines must separate regulated games from non-regulated games by a buffer zone of no less than ten feet. Pet. App. 90a, 92a. In addition, facilities with five or more machines must construct

non-transparent barriers around the regulated games to completely obstruct the view of the games from all persons outside the partitioned areas, regardless of their age. *Id.* Even facilities with less than five regulated games must take affirmative action to insure that unaccompanied minors, no matter how sophisticated or mature, and regardless of their distance away from the machine, not even view those games for longer than twenty-nine seconds. Pet. App. 87a. And, every game or game area regulated by the Ordinance must display mandatory signage announcing the requirements of the Ordinance. Pet. App. 90a, 92a.

These provisions of the Ordinance burden the First Amendment rights of adult parents, adult non-parents, minors, businesses that offer the regulated games, creators of the regulated games and virtually every other person who might seek to provide or to gain access in any way to this medium of expression.

III. The City's Rationale.

The Ordinance labels regulated video games as "harmful to minors." Pet. App. 85a. Petitioners, however, have failed to establish any harm – physical, emotional or psychological – caused by the targeted games.

There is no factual support for the petitioners' repeated representations that there exists scientific evidence establishing "a link" between children's exposure to violent media, "particularly interactive violent video games," and children's anti-social or violent behavior. Pet. 3, 10. The Petition establishes no such link. The Seventh Circuit found no such link. The district court found no such link. The preamble to

the Ordinance claims no link and the authors of the studies cited by the Ordinance claim no link. Pet. App. 85a-86a.

The Seventh Circuit examined the studies relied upon by petitioners and concluded correctly that "[t]hose studies do not support the ordinance." Pet. App. 11a. The Seventh Circuit recognized the significant distinction between unjustified claims of anti-social or violent *behavior*, as asserted by the petitioners, and aggressive or assertive *thoughts*, as suggested by some disputed studies. Judge Posner writing for the unanimous panel explained "[t]he studies do not find that video games have ever caused anyone to commit a violent act, as opposed to feeling aggressive, or have caused the average level of violence to increase anywhere." Pet. App. 11a.

The district court also failed to find such a link and acknowledged that even the authors of the studies relied upon by the City found no link to *violent behavior*, as opposed to aggressive play in laboratory experiments, and even with respect to that aggressiveness admitted that "any causal statements would be premature." Pet. App. 50a, 51a.

Indeed, the petitioners failed to offer evidence of a single scientific study that actually analyzed the sole medium of expression restricted by the Ordinance - - currency-operated video games located in public places. Thus, the unanimous panel of the Seventh Circuit held that this Ordinance "curtails freedom of expression significantly and, on this record, without any offsetting justification, 'compelling' or otherwise." Pet. App. 13a.

IV. The District Court.

The district court, after an evidentiary hearing on respondents' motion for preliminary injunctive relief, analyzed the evidence in the record and concluded that currency-operated video games have sufficient expressive, informational and communicative content to be protected by the First Amendment. Pet. App. 25a-32a. The district court further concluded that the Ordinance is a content-based restriction on that free expression, singling out certain video games for regulation solely because of the nature of their expression. Pet. App. 33a.

Then, the district court departed from all precedent and held that animated depictions of violence could be deemed constitutionally "obscene," despite their absence of sexual content, and be regulated by government so long as the government action was not unreasonable. Pet. App. 52a.

V. The Court of Appeals.

The unanimous panel of the court of appeals reversed the district court, rejecting the district court's departure from precedent and remanding for further proceedings. The court of appeals, consistent with all precedent including *Miller v. California*, 413 U.S. 15 (1972) and *Winters v. New York*, 333 U.S. 507 (1948), held that obscenity and violence are distinct categories of depictions. Pet. App. 3a. Emphasizing the "literary" character of these games, the court of appeals held that the City's restriction on this expression must be analyzed with the same strict scrutiny demanded of all content-based restrictions on protected expression. Pet. App. 5a-6a.

Petitioners sought rehearing and rehearing *en banc*. All of the judges on the original panel voted to deny the petition for rehearing and no judge requested a vote on the petition for rehearing *en banc*. Pet. App. 84a.

REASONS FOR DENYING THE WRIT

The petition for writ of certiorari should be denied for three compelling reasons: First, the petition asks the Court to grant interlocutory review, contrary to the Court's policy against piecemeal appeals. The record and issues are not fully developed, and on remand the district court could dispose of this case on grounds that would make the Court's review of the issues raised by the petition wholly unnecessary. Second, the petition's assertion that the Seventh Circuit's unanimous decision conflicts with decisions of this Court, other courts of appeals and state courts of last resort, rests squarely on inventive and erroneous readings of the case law. Indeed, the opinion of the Seventh Circuit, as evidenced by the denial of the petitioners' motion for a rehearing and rehearing *en banc* is in no way contrary to or a deviation from the holdings of any precedent or other circuit court. Third, the Seventh Circuit's opinion is a correct application of this Court's well-established jurisprudence protecting the freedoms guaranteed by the First Amendment, jurisprudence that has been applied consistently, and without confusion, by the circuit courts including the Seventh Circuit.

I. This Is A Petition From An Interlocutory Ruling And Review Is Inappropriate.

Petitioners seek review of an appellate determination that overturns a district court's denial of a motion for a preliminary

injunction and remands for further proceedings. The interlocutory character of the case "of itself alone furnishe[s] sufficient ground for the denial" of the petition. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *see also Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., concurring) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.").[1]

The court of appeals held that the respondents had demonstrated a likelihood of success on the merits based on the record so far. Pet. App. 13a. It specifically refused to opine on what type of evidence might be offered on remand or the effect of that evidence. *Id.* The petitioners represented at oral argument before the court of appeals their intention to introduce additional evidence in support of the Ordinance. There has been no indication that petitioners intend to forego this opportunity. On remand, if petitioners' claims of harm and narrow tailoring are supportable and the Ordinance survives strict scrutiny analysis, then all of the issues in this petition will be significantly altered.

[1/]The petitioners also cite to the existence of pending legislation in various local jurisdictions concerning similar subject matter as the Ordinance. Rather than providing the Court with a reason to grant certiorari in this case, the existence of such legislation provides an additional reason for denying the petition. Indeed, the Court should allow challenges to such legislation to percolate through the courts, in order to permit the issues presented by legislation in this area to be fully developed.

Although the court of appeals reversed the district court on the appropriate level of scrutiny to be applied to government restrictions on animated depictions of violence, respondents also argued below that the Ordinance was void for vagueness. The court of appeals did not reach this issue and the district court did so only preliminarily. On remand, the Ordinance could be struck down on this basis without the need to reach any of the issues raised by the petition.

Section 831-7 of the Ordinance prohibits regulated video games from being made available or played on public property.[2] Respondents have challenged the constitutionality of this section as well. The district court found that respondents were unlikely to suffer irreparable harm from this section of the Ordinance. Pet. App. 101a. The Seventh Circuit did not expressly address this section of the Ordinance in its opinion. When entering the preliminary injunction mandated by the court of appeals, the district court reaffirmed its view on irreparable injury and expressly invited additional evidence on the question of harm. Pet. App. 98a.

All of these issues likely will need to be further addressed in both the district court and the court of appeals as these proceedings move forward. Thus, the procedural posture of this case warrants denial of the petition.

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[2]Petitioners claim that this issue has been waived, for purposes of appealing injunctive relief. Respondents do not agree. This too is an issue to be addressed as these proceedings move forward.

II. The Decision Of The Seventh Circuit Is Correct And In Accord With The Decisions Of This Court, The Courts Of Appeals And The State Courts Of Last Resort; There Is No Conflict To Be Resolved.

A. The Seventh Circuit's Conclusion That The Ordinance Regulates Protected Expression Is Not In Conflict With Any Decision Of Any Court.

The absence of any true conflict or novel constitutional issue in this case is demonstrated by petitioners' opening argument that seeks to manufacture a conflict between the Seventh Circuit ruling and a 1983 decision of the Massachusetts Supreme Judicial Court. Simply stated, there is no conflict.

In the instant case, the court of appeals was concerned with the scope of *this* Ordinance and contemporary video games in the record of *this* case. The court of appeals reviewed the actual record in this case and concluded "[m]ost of the video games in the record of this case ... are stories." Pet. App. 9a. They have a "message, even an 'ideology,' just as books and movies do." Pet. App. 10a. The court specifically described the story contained in the game "The House of the Dead," and its similarity to George A. Romero's famous zombie movie "The Night of the Living Dead." *Id.* The court similarly described the message or ideology of the game "Ultimate Mortal Kombat 3," and its feminist theme. *Id.* The court of appeals made no judgment with respect to the 1980's era video games before the Massachusetts court. The court concluded that today's video games as demonstrated in this record, contain protected expression under the First Amendment. Pet. App.

10a. The district court reached the same conclusion.[3] Pet. App. 30a.

In contrast, the Massachusetts court did not make any judgment about "The House of the Dead," "Ultimate Mortal Kombat 3," or any other video game in the record of this case. The Massachusetts court reviewed the contents of entirely different video games of an entirely different generation. Significantly, however, even in 1983 the Massachusetts court expressly recognized that video games (like those analyzed by Judge Posner in 2001) might develop and thereby be entitled to First Amendment protection, explaining: "We recognize that in the future video games which contain sufficient communicative and expressive elements may be created." *Marshfield Family Skateland, Inc. v. Town of Marshfield*, 450 N.E.2d 605, 609-10 (Mass. 1983).

As predicted by the Massachusetts court, both the court of appeals and the district court concluded that based on the record of this case contemporary video games had indeed developed to be as expressive or communicative as any movie or book. Pet. App. 9a, 10a, 29a. Thus, not only is there no conflict, but the Seventh Circuit and the Massachusetts Supreme Judicial Court are in accord.

Nor is petitioners' claim of a conflict supported by their reliance on a handful of other zoning and licensing cases from almost twenty years ago. Pet. 11, 12. Those cases, like

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[3]The district court also found that contemporary video games were entitled to First Amendment protection on the value of their visual art, Pet. App. 32a, an issue the court of appeals did not reach but which is amply supported by the record.

Marshfield Family Skateland, were based on significantly different records, at a time when video games were still very much in their infancy. Ten years ago the Seventh Circuit, echoing the analysis of the Massachusetts Supreme Judicial Court, recognized that the progress and change that already had occurred in video games might mandate their protection under the First Amendment as of that time. *Rothner v. City of Chicago*, 929 F.2d 297, 303 (7th Cir. 1991).

Moreover, in each zoning and licensing case relied upon by petitioners, the court was reviewing a *content neutral* zoning issue. As held most recently in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000), the level of scrutiny in zoning cases, which regulate secondary effects and not content, is significantly less. *Id.* at 815. Where "[t]he statute ... before us burdens speech because of its content; it must receive strict scrutiny." *Id.*

In addition, there is no constitutional support for petitioners' claim that the Ordinance does not regulate protected expression because it restricts only those video games that the City believes lack "serious literary, artistic, political or scientific value...." Pet. 11. Petitioners cite no authority for this proposition, and First Amendment jurisprudence prevents government from making value judgments on protected expression.

In *Winters v. New York*, the Court found depictions of violent expression protected '[t]hough we can see nothing of any possible value to society in [them] ...." 333 U.S. 507, 510 (1948). In *Stanley v. Georgia*, the Court explained "[t]he line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line

can be drawn at all." 394 U.S. 557, 566 (1969). *See also United States v. Playboy Entertainment Group*, 529 U.S. at 818 (judgments about aesthetics and morals "are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority."). Only in the area of obscene material does the Court look to the material's value, and then it does so only in an attempt *to resurrect* constitutional protection, not to defeat that protection. *See Miller v. California*, 413 U.S. 15, 24 (1972); *see also Miller v. Civil City of South Bend*, 904 F.2d 1081, 1098 (7th Cir. 1990) (Posner, J., concurring) ("There are no objective standards of aesthetic quality, and while we allow obscene works to be 'redeemed' by 'evidence' of aesthetic quality, it hardly follows that we should allow works that are not obscene to be condemned on the basis of evidence suggesting a lack of aesthetic quality"), *rev'd on other grounds sub nom. Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

In sum, while the petitioners argue that there is a conflict and argue this is an important constitutional issue, they cite to no authority other than licensing cases, which are inapposite. In contrast, the undisputed factual record of this case and the legal authorities cited throughout support the unanimous decision of the court of appeals that contemporary video games encompass protected expression.

B. The Seventh Circuit's Distinction Between Obscenity And Violence Is In Full Accord With Precedent.

At the heart of this case is the Seventh Circuit's reversal of the district court's refusal to honor the distinction between obscenity and animated depictions of violence, a distinction mandated by this Court's judicial definition of obscenity and

followed by every court of appeals, including the Seventh Circuit, since that time. Depictions of animated violence and depictions of obscenity are constitutionally distinct categories subject to different constitutional analyses. There is no confusion or disagreement among the courts and, significantly, petitioners again fail to cite any authority to the contrary.

The definition of "obscene" material for purposes of First Amendment inquiry is specifically limited to material that deals with *sex*. In *Roth v. United States*, 354 U.S. 476 (1957), this Court directly addressed the constitutional question of the States' ability to restrict access to material deemed "obscene." In holding that obscenity is not protected speech, the Court specifically held that, "[o]bscene material is material which *deals with sex in a manner appealing to prurient interest*." *Id.* at 487 (emphasis added). Even while creating this exception to First Amendment freedoms, the Court warned that this exception must be narrowly construed, declaring

> [t]he fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests.

Id. at 488; *accord Cohen v. California*, 403 U.S. 15, 20 (1971); *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966).

The petition argues that notwithstanding the long and conflict-free history of First Amendment jurisprudence, dictionary definitions should decide this case and dictate what material may be deemed obscene. Pet. 17-18. The Court, however, in *Miller v. California*, 413 U.S. 15, 24 (1972) expressly rejected dictionary definitions of obscenity. Instead, the Court explained that for purposes of ascertaining protection under the First Amendment, this Court has adopted a *judicial* definition of obscenity that is limited to matters relating to *sex,* stating:

> This Court has defined "obscene material" as "material which deals with sex in a manner appealing to prurient interest," *Roth v. United States*, *supra*, at 487 .... We note, therefore, that the words "obscene material," as used in this case, have *a specific judicial meaning* which derives from the *Roth* case, *i.e.*, *obscene material "which deals with sex.*"

Id. at 18-19 n.2 (emphasis added) (citations omitted). Leaving no room for doubt, the Court further explained that "we now *confine* the permissible scope of such regulation to works which depict or describe *sexual conduct.*" *Id.* at 24 (emphasis added). The Court purposely imposed this outermost limit because of "the inherent dangers of undertaking to regulate any form of expression." *Id.* at 23.

Images or depictions of violence, unrelated to sex, therefore, cannot be deemed "obscene" under the First Amendment. The courts of appeals have repeatedly affirmed this bright-line distinction between obscenity and images of violence. *See, e.g., Eclipse Enter., Inc. v. Gulotta*, 134 F.3d 63, 66 (2d Cir.

1997) ("The Supreme Court has historically confined the categories of unprotected speech to defamation, fighting words, direct incitement of lawless action, and obscenity.... We decline any invitation to expand these narrow categories of speech to include depictions of violence") (citations omitted); *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 688 (8th Cir. 1992) ("Material that contains violence but not depictions or descriptions of sexual conduct cannot be obscene"); *United States v. Thoma*, 726 F.2d 1191, 1200 (7th Cir.), *cert denied*, 467 U.S. 1228 (1984) ("Depictions of torture and deformation are not inherently sexual and, absent some expert guidance as to how such violence appeals to the prurient interest of a deviant group, there is no basis upon which a trier of fact could deem such material obscene.").

The state high courts are also in accord. *Louisiana v. Johnson*, 343 So. 2d 705, 710 (La. 1977) (Ordinance that "facially purports to proscribe patently offensive violent materials, exceeds the limits placed upon the regulation of obscene materials ...."); *Police Commissioner v. Siegel Enter., Inc.*, 162 A. 2d 727, 731 (Md.), *cert. denied,* 364 U.S. 909 (1960) ("The exclusion of obscenity from protected utterance does not carry with it the right to obscure from young or old facts or events, however unpleasant, disturbing or violent.").

Indeed, not only are images of violence not equivalent to obscenity, images of violence receive full protection under the First Amendment. More than fifty years ago, the Court in *Winters v. New York*, 333 U.S. 507, 510 (1948), squarely explained that "[t]hough we can see nothing of any possible value to society in these magazines [containing depictions of bloodshed and violence], they are as much entitled to the protection of free speech as the best of literature." This

mandate has been followed, without exception, with respect to efforts at prior restraint, *see, e.g., Eclipse Enter., Inc. v. Gulotta,* 134 F.3d 63; *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, as well as restraint from civil liability, *see, e.g., Olivia N. v. National Broadcast Co.*, 178 Cal. Rptr. 888 (Cal. Ct. App. 1981). Thus, petitioners' claim of deep confusion among the circuits, and argument that images of animated violence by cartoon-like characters may be deemed constitutionally obscene are baseless.

C. The Seventh Circuit's Refusal To Expand The Doctrine Of Variable Obscenity Is In Accord With The Decision Of All Other Circuits.

Nor is there confusion or disagreement on the proper application of the doctrine of variable obscenity announced by the Court in *Ginsberg v. New York,* 390 U.S. 629 (1968). In *Ginsberg*, the Court held that material could be deemed "obscene as to minors" at a lower threshold than what could be deemed "obscene as to adults." In the more than thirty years since *Ginsberg* was decided, not a single circuit court has expanded the holding of *Ginsberg* beyond matters relating to sex. During those thirty years, *Ginsberg* has been applied consistently and in accord with the Seventh Circuit's decision in this case.

Specifically, *Ginsberg* concerned the regulation of "girlie" magazines that depicted nudity, sexual conduct, sexual excitement or sadomasochistic abuse. 390 U.S. at 633, 646 (describing the N.Y. statute). The narrow issue before the Court was whether a state could impose "a more restricted right [on minors] than that assured to adults to judge and determine for themselves what *sex materials* they may read or see." *Id.* at

636-37 (emphasis added). In the *Ginsberg* Court's own words, the parameters of its decision were limited to dealing with an "adjust[ed] ... definition of *obscenity* ... in terms of the sexual interests ... of such minors." *Id.* at 638 (emphasis added, citation and internal quotations omitted). Nothing more.[4]

If after *Ginsberg* there was any doubt that the doctrine of variable obscenity was limited to matters relating to erotic or sexual conduct, these doubts were resolved unambiguously in *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975). In *Erznoznik,* the Court reaffirmed minors' significant First Amendment rights, as declared in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), and in protecting those rights expressly closed the door on any expansion of the *Ginsberg* doctrine of variable obscenity. *Erznoznik* specifically set forth the outer limitation of the *Ginsberg* doctrine, explaining:

> We have not had occasion to decide what effect *Miller* [*v. California*] will have on the *Ginsberg* formulation. It is clear, however, that under *any test of obscenity as to minors ... "such expression must be, in some significant way, erotic."*

422 U.S. at 213 n.10 (citations omitted) (emphasis added).

The circuit courts agree not only that obscenity as to minors is limited to material of a sexual nature but also, and more

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[4]In fact, the Court in *Ginsberg* cited with approval a law review article that rejects the idea that violent material is "obscene." *See* 390 U.S. at 638-39 n.6 (citing with approval Comment, *Exclusion of Children From Violent Movies*, 67 Col. L. Rev. 1149 (1967)).

specifically, that depictions of violence are not obscene as to minors and, thus, not proscribable. For example, in *Interstate Circuit, Inc. v. City of Dallas*, 366 F.2d 590 (5th Cir. 1966), *vacated on other grounds*, 391 U.S. 53 (1968), the Fifth Circuit demonstrated the bright line between impermissible restrictions on depictions of violence and permissible restrictions on depictions of sexual conduct, holding a city ordinance unconstitutional in its reach beyond traditional obscenity to violence. *See also Cinecom Theatres Midwest States, Inc. v. City of Fort Wayne*, 473 F.2d 1297, 1301-02 (7th Cir. 1973) (adopting *Interstate Circuit* rationale); *Video Software Dealers Ass'n v. Webster*, 968 F.2d at 688 (limiting *Ginsberg* to obscenity, and excluding depictions of violence); *Eclipse Enters., Inc. v. Gulotta,* 134 F.3d at 67, 68 (same).

This record of judicial unanimity is fully consistent with First Amendment jurisprudence in general. In treading into the area of proscribable speech, the courts are routinely cautioned to step lightly and with care. Thus, the categories of proscribable speech are narrowly circumscribed. *R.A.V. v. City of St. Paul,* 505 U.S. 377, 383 (1992); *Denver Area Educ. Telecom. Consortium, Inc. v. FCC,* 518 U.S. 727, 774 (1996) (Souter, J., concurring).

Petitioners' desire to expand *Ginsberg* beyond its fixed and limited scope into all legislation with a stated purpose of protecting minors "is of course contrary to all traditions of our jurisprudence ...." *R.A.V. v. City of St. Paul,* 505 U.S. at 387 n.5. As this Court explained in *Reno v. ACLU*, 521 U.S. 844, 875 (1997), "the mere fact that a statutory regulation of speech was enacted for the important purpose of protecting children from exposure to sexually explicit material does not foreclose inquiry into its validity." *See also United States v. Playboy*

Entertainment, 529 U.S. at 816; *ACLU v. Reno*, 929 F. Supp. 824, 882 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997).

Finally, petitioners' citation to the recent opinion in *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), as support for their contention that a lower level scrutiny is applicable, is unhelpful. Pet. 24. The ordinance in *Pap's A.M.* was a content-*neutral* ordinance, which regulated the secondary effects of *conduct* only, not speech. 529 U.S. at 290-91. The Court explained that the level of scrutiny to be applied is determined by whether the ordinance is content-based, *not* at whom it is aimed to protect. *Id.* at 289. And, where it is content-based, it gets "a more demanding standard'" of scrutiny." *Id.*

D. There Is No Conflict In The Application Of Strict Scrutiny.

The court of appeals' unanimous ruling that petitioners' efforts to censor animated images of violence is subject to strict judicial scrutiny is correct, and in full accord with Supreme Court precedent and the decisions of every court of appeals to address the issue. *See, e.g., United States v. Playboy Entertainment Group,* 529 U.S. at 814-15; *Turner Broadcasting v. FCC*, 512 U.S. 622 (1994); *Eclipse Enter., Inc. v. Gulotta,* 134 F.3d at 67; *Video Software Dealers Ass'n v. Webster,* 968 F.2d at 689.

Strict scrutiny analysis for content-based restrictions of protected expression is at the heart of the First Amendment. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Accordingly,

content-based regulations are presumptively unconstitutional. *R.A.V. v. City of St. Paul*, 505 U.S. at 382; *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 115 (1991).

Petitioners' contention that "the Courts below are in disarray as to the standard of scrutiny to be applied to content-based restrictions on speech that affect minors," is erroneous. Pet. 14. Indeed, the cases cited by petitioners demonstrate that the courts below are uniform in their application of strict scrutiny, and not in disarray.

First, petitioners point to the application of strict scrutiny by the Second, Eighth and Ninth Circuits in *Eclipse Enters., Inc. v. Gulotta,* 134 F.3d at 67; *Crawford v. Lungren*, 96 F.3d 380 (9th Cir. 1996), *cert. denied*, 520 U.S. 1117 (1997) and *Video Software Dealers Ass'n v. Webster,* 968 F.2d at 689, respectively. Pet. 15. In each instance, the court of appeals applied strict scrutiny, as in each case the regulation restricted protected expression.

Second, petitioners cite three cases as deviating from this level of scrutiny. In fact, these cases deviate only because the constitutional issue differs. The first two cases -- *American Booksellers v. Webb,* 919 F.2d 1493 (11th Cir. 1990), *cert. denied*, 500 U.S. 942 (1991) and *M.S. News Co. v. Casado,* 721 F.2d 1281 (10th Cir. 1983) -- concern the regulation of material of a sexual nature as to minors. Thus, strict scrutiny was not applied and should not have been applied. In these two cases the standard formulated by this Court in *Ginsberg v. New York,* 390 U.S. 629 (1968), which addresses the lower standard of scrutiny to be applied to regulations of sexual material for minors, was undoubtedly applicable. These two cases,

therefore, present no conflict because they applied the proper standard of review, a standard inapplicable to the instant case because the challenged provisions of the instant Ordinance regulate animated violence, not matters relating to sex.

Similarly, the other allegedly conflicting decision -- *Schleifer v. City of Charlottesville,* 159 F.3d 843 (4th Cir. 1998), *cert. denied,* 526 U.S. 1018 (1999) -- is wholly inapplicable. *Schleifer* concerns a challenge to a curfew ordinance, *i.e.,* a content neutral regulation. Thus, the applicable standard of review, as with all legislation concerning content-neutral time, place and manner restrictions, was a standard "less than the strictest level of scrutiny". *Id.* at 847; *see also United States v. Playboy Entertainment Group,* 529 U.S. at 815.

Petitioners are also incorrect in contending that the Supreme Court has never applied a more demanding level of scrutiny than that set forth in *Ginsberg* to content-based prohibitions on speech that affected minors only. *See, e.g., Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 393 U.S. at 511 (holding that there must be "evidence" that the regulation is "necessary" to address a specified harm); *Erznoznik v. City of Jacksonville,* 422 U.S. at 217-18 (the ordinance must be narrowly tailored to survive constitutional scrutiny). The Circuits agree. *See, e.g., Eclipse Enters., Inc. v. Gulotta,* 134 F.3d at 67 (applying strict scrutiny); *Video Software Dealers Ass'n v. Webster,* 968 F.2d at 689 (same).

Thus, there is no conflict among the courts of appeals as petitioners suggest. Nor is there a conflict with any decision of this Court. Content-based restrictions on protected expression, except those concerning regulation of sexual material, are subject to strict scrutiny. This level of constitutional review

permits legitimate and necessary restrictions on protected expression, but invalidates illegitimate, speculative and overly-broad restrictions on protected expression. Any other level of review would render the First Amendment mandate that government "shall make no law ... abridging the freedom of speech," impotent.

Petitioners have the opportunity on remand to prove their contention that the video games regulated by this Ordinance are harmful and that the draconian measures of this Ordinance are necessary. If petitioners meet this burden, then the issue of the appropriate level of scrutiny raised by this petition is moot. If petitioners have no additional evidence on remand, the appropriate level of scrutiny is equally moot, as the Seventh Circuit has held that on this record the Ordinance "curtails freedom of expression significantly ... without any offsetting justification, 'compelling' or otherwise." Pet. App. 13a. Which course of action petitioners will take on remand is unknown, but both courses of action further demonstrate that there is no reason for this Court to deviate from its normal practice of rejecting petitions from interlocutory rulings, and the Court should allow the district court and court of appeals to develop a full record from which to decide genuine issues of constitutional concern. On this record, there is no such issue.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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